Supreme Court of the United States

No. ~~708~~ 69—October Term, 1952.

DR. EDWARD K. BARSKY,

Appellant,

—against—

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Abraham Fishbein,
Attorney for Appellant.

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Supreme Court of the United States

No. 798—October Term, 1952.

In the Matter of the Application

—of—

DR. EDWARD K. BARSKY,
Petitioner-Appellant,

for Review under Article 78 of the Civil Practice Act, of the determination of

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, suspending petitioner's medical license and permission to practice medicine in the State of New York for six months,
Respondent-Appellee.

APPELLANT'S REPLY TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The sole ground upon which Appellee moves to dismiss the appeal or affirm the judgment of the Court below, is that no substantial Federal question is presented. Concededly, every other requisite to this Court's jurisdiction exists.

It is submitted that the motion lacks merit. Plainly the Federal questions presented are not frivolous. The dissenting opinion clearly indicates that there are a number of substantial, Federal constitutional questions involved, that the

holding of the Court of Appeals was unprecedented, and that "the present decision has an importance that * * * reaches far beyond this case. And that—its impact over the years —is what so deeply troubles and concerns me." The American Civil Liberties Union interposed a brief below, as amicus curiae, on the Federal constitutional questions. Some 1700 physicians from all over New York State similarly signed and interposed a brief below, as amici curiae.

Appellee concedes that Appellant presented Federal constitutional questions in the courts of New York. Actually, these questions were raised in Appellant's answer to the charges Appellee preferred against him, and in the hearings before the Appellee, even before the matter reached the courts. This matter is therefore unlike *Honeyman* v. *Hanan*, 300 U. S. 14, 17, cited by Appellee, where the record revealed that no Federal question had been presented "In the entire progress of the case to this point of determination by the highest court of the State."

Appellee errs in its claim that no constitutional question was noted in the majority opinion of the Court of Appeals. The opinion held: "Stringent as it is, that statute needs no cutting down, for constitutionality's sake." Appellee errs in its statement that "The only suggestion of a Federal question was in the last two paragraphs of the dissenting opinion." Judge Fuld mentioned constitutional questions elsewhere throughout his dissent. A succinct, three-page summary of some of the Federal constitutional questions is contained in the dissent, 305 N. Y. at 107-9.

On Appellaat's motion, the Court of Appeals added to the remittitur, a certificate that Federal constitutional questions were presented and necessarily passed upon. Appellee opposed the granting of a certificate, both orally on the presentation of Appellant's order to show cause to Judge Desmond who wrote the majority opinion, and in its brief in opposition to Appellant's motion, where Appellee advanced the

same contentions and citation it advances on its motion here. The certificate was granted, but not pro forma. The Federal constitutional questions were not "incidental." The Court below stated in its certificate that they were "necessarily passed upon." The opinions below and the Statement as to Jurisdiction show they are fundamental. In its mentioned brief below, Appellee alluded to "the importance of the rights invoked by the Petitioners," when discussing why "These appeals * * * were given extraordinary time and attention by this Court." In addition, the Court of Appeals granted a stay of the suspension of Appellant's medical license, pending the outcome of the appeal to this Court. The discipline imposed upon Doctors Auslander and Miller, was also stayed pending the final determination of this appeal, and the final status of their cases is being held in abeyance pending that determination. Subsequently, the Chief Judge of the Court of Appeals granted leave to appeal to this Court.

Appellee's claim of lack of a substantial Federal question, is contained in one generalized sentence without supporting arguments or authorities. Appellee makes no claim that the questions presented are frivolous or that they are foreclosed by prior decisions of this Court. Appellant's Statement as to Jurisdiction shows that the Federal questions are substantial and are not foreclosed by any prior decision of this Court. On the contrary, it is submitted they were decided in a manner that conflicts with the decisions of this Court.

Appellee comments that the Federal questions are about as thin as the Statement of Jurisdiction is thick. A worn phrase is hardly a substitute for supporting arguments or authorities. As to the length of Appellant's Statement, we state candidly that despite numerous, diligent efforts, we simply found it impossible to shorten the Statement and still present the issues adequately. Brevity, of course, is preferable, where possible. Yet an attorney may find himself required to choose between a brevity to which the particular situation may not lend itself, and a greater length, which his

considered judgment deems essential. Here, the constitutionality of the statutes involved has never been passed upon; the issues are of far-reaching importance to all professions and pursuits; a summary of the factual situation was necessary to an understanding of the Federal questions; and a number of separate and distinct Federal questions were involved, each of which is substantial, and each of which required analysis, arguments, and authorities. We therefore ask indulgence for the length of the Statement as to Jurisdiction.

Appellant submits that this case is within the appellate jurisdiction of this Court, that substantial Federal questions are presented, and that Appellee's motion to dismiss or affirm should be denied.

Respectfully submitted,

ABRAHAM FISHBEIN,
Attorney for Appellant.